IN THE SUPREME COURT OF THE UNITED STATES

May Term, 1977

No. 76-6837

FLOYD EDWARDS

Petitioner

-vs-

THE STATE OF OHIO

Respondent

****

RESPONDENT'S ANSWER

TO

PETITION FOR A WRIT OF CERTIORARI

From the Supreme Court of Ohio

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STEPHAN M. GABALAC
Prosecuting Attorney

CARL M. LAYMAN III
Assistant Prosecuting Attorney
Appellate Review Division
City-County Safety Building
53 East Center Street
Akron, Ohio 44308

216/379-5510

Counsel for Respondent

ALBERT S. RAKAS
RICHARD L. AYNES
ROBERT J. CROYLE
Attorneys at Law
Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325

216/375-7331

THEODORE CHUPARKOFF
Attorney at Law
501 East Exchange Street
Akron, Ohio 44307
216/376-2156

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

TABLE OF CONTENTS (cont.)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (cont.)

TABLE OF AUTHORITIES (cont.)

OPPOSITION OF JURISDICTION

Petitioner has failed to raise an issue of consitutional dimensions, requiring review pursuant to 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

Defendant was indicted for Aggravated Murder and Aggravated Robbery. Prior to trial, a hearing on a motion to suppress was held concerning the statements given by Floyd Edwards. That motion and other pre-trial motions were overruled. Upon the evidence presented, the jury found Edwards guilty of Aggravated Murder with a specification, and Aggravated Robbery. A mitigation hearing was had on April 29, 1975. The court determined that Edwards was not mentally deficient, and sentenced him to death in the electric chair. He was also concurrently sentenced to 7-25 years imprisonment for the conviction of Aggravated Robbery.

STATEMENT OF FACTS

Floyd Edwards was walking down Wooster Avenue, December 28, 1974, and met Stanford Harris. Edwards told Harris that he was going to rob Joseph Eschack. Edwards showed Harris a gun, and asked him if he wanted to come along. Harris answered yes. Joseph Eschack owned a tool rental and sale store, Comet Tools, located at 223 Wooster Avenue. Edwards on prior occasions had sold tire jacks to Eschack. Edwards and Harris entered the store and haggled over the price of various tools scattered about the floor of the store. The last item Edwards inquired about was a pair of wire cutters. As Eschack bent over to pick up the wire cutters, Edwards pulled the gun, and told Eschack to give him his money. Edwards grabbed Eschack's arm, and Eschack dropped the wire cutters. The two struggled and Edwards shot Eschack once in the head. That shot resulted in the death of Joseph Eschack. Eschack's wallet, containing $65.00, and some identification papers were taken and divided by Edwards and Harris. Petitioner also stated that he showed a friend, Haward Manning, a newspaper article about the event, and talked about what happened at Eschack's place, and told Manning it did not bother him.

Gary Hendon, a custodian at the Edgewood Apartment Project found Eschack's wallet in the basement of one of the apartments. Gary went to school with Edwards and remembered seeing Edwards in the basement two or three days before finding

the wallet. Hendon gave the wallet to his boss, Dan Goins, who turned it in to the police. On January 9, 1975, Edwards was picked up by a car being driven by Haward Manning at approximately 5:30 p.m. Akron Police officers, on a stakeout, stopped the car and arrested both men.

Edwards was interrogated initially by Detectives Cross, Goodwell, and Craig. Edwards gave an oral, unrecorded statement, at approximately 6:30 p.m.

At 8:20 p.m., Edwards gave a recorded statement in the presence of Assistant Prosecuting Attorney John Shoemaker, and the above named detectives. When Prosecutor Shoemaker flipped the cassette to side two, it did not properly engage. Approximately 75 feet of the tape was blank. At 10:25 p.m., another recorded statement was taken to fill in the blank 75 feet.

Sometime during the interrogation of Edwards, and Manning, the location of the gun was ascertained. A search warrant was drawn and a search of 1125 Inman Street was made. During that search, a .32 Caliber automatic pistol was found. Edwards admitted that the gun was the one he used to shoot Eschack (Transcript, Page 401). This statement was also recorded at 2:45 a.m., January 10, 1975. The gun was eventually physically linked to the crime through a test firing.

PETITIONER'S FIRST REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE OHIO CAPITAL PUNISHMENT STATUTES AND THE SENTENCE OF DEATH GIVEN TO PETITIONER VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PART B

THE OHIO STATUTES VIOLATE PETITIONER'S FOURTEENTH AMENDMENT RIGHTS BY PLACING THE BURDEN OF PROOF UPON HIM WITH RESPECT TO THE ISSUE OF DEGREE OF CULPABILITY AND RESULTING PUNISHMENT.

Mullaney v. Wilbur, 421 U.S. 684 (1975) held that the Due Process Clause of the Fourteenth Amendment requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. The Court held that the Maine statute requiring the defendant to prove that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter, violated this requirement, and that in fact the State was required to prove the absence of this fact.

Respondent strongly contends that the rule of law enunciated in Mullaney does not apply to sentencing. One can readily distinguish proof of an element of a crime, from evidence presented at sentencing. The former is a presentation of the facts necessary to support each element of the crime. The Respondent accepts the burden of proving each element of the crime of aggravated murder beyond a reasonable doubt. It did so in this case.

However, sentencing and the procedures therein are a different matter. As in Florida, the Ohio statute requires the trial judge to consider sentencing. In determining that the death sentence should be imposed, the trial judge need only find that the mitigating factors are insufficient to outweigh the aggravating factors. Fla. Stat. Ann., section 921.141(3) (Supp. 1976-1977). Even when the jury recommends life, the trial judge may impose the death penalty where the facts supporting the death penalty are so clear and convincing that "Virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (1975).

The Respondent submits that there is no support for Petitioner's contention that the State must maintain the burden of proof beyond a reasonable doubt. To the contrary, this Court sustained Florida's capital sentencing structure, which requires the trial judge to find that the mitigating factors outweigh the aggravating factors. Proffitt v. Florida, 428 U.S. 242 (1976).

PART C

THE OHIO DEATH PENALTY STATUTES VIOLATE PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO A TRIAL BY A JURY OF HIS PEERS.

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15, but it has never sugusted that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases. Proffitt v. Florida, supra.

It is a somewhat analomous argument to say that juries will sentence more even handedly than judges in capital cases. Juries do not ordinarily take part in the sentencing procedures in our system of criminal justice. They have a one shot opportunity to exercise this function. To say that they will be less arbitrary, and capricious than a trial judge who is experienced in the area of sentencing as it applies to the entire milieu of criminals, defies logic. A jury does not have the ability to compare the offender before it, with the other defendants similarly situated.

Petitioner facilely remarks that jury nullification is minimized by taking unbridled jury discretion away from juries in the face of mandatory death penalties, but implies that Ohio has a problem with jury nullification. That

argument is specious for two reasons. First, Ohio does not have a mandatory death penalty. Second, the jury does not make the sentencing decision.

Petitioner asserts that the jury should have the opportunity to weigh the aggravating and mitigating factors. It should be emphasized again, that the jury does determine the presence or absence of aggravating specifications. The jury considers the more factual aspects of the death penalty decision in considering whether a specification exists, or not. For example, in the instant case the jury found the Petitioner guilty of murder during the commission of Aggravated Robbery. Ohio Revised Code Section 2929.04(A)(7) (Specification).

Before the mitigation hearing the trial court is required to have a pre-sentence investigation and a psychiatric examination made. Ohio Revised Code Section 2929.03(D). These reports provide a wealth of information concerning "the character, conduct and record of the individual offender." Thus, the judge considers the usual sentencing criteria, in the mitigation hearing. The defendant has the advantage of a jury making statutorily guided decisions, and a judge evaluating him on an individual basis before the imposition of the death penalty.

If this Court determined that Florida's capital punishment statute withstood constitutional muster, Proffitt v. Florida, supra, then Ohio's statute should likewise meet the

both the aggravating, and mitigating factors. In Ohio, the jury has already determined that an aggravating factor existed beyond a reasonable doubt. Accordingly, one must conclude that Ohio has gone further than the Supreme Court has required, in allowing the jury to take part in a portion of the death penalty decision making process. Since there is no constitutional requirement that a jury must take part in the sentencing process, Petitioner's argument herein is without merit.

PART D

THE STATE HAS ESTABLISHED NO COMPELLING STATE INTEREST WHICH WOULD JUSTIFY DEPRIVING PETITIONER OF HIS FUNDAMENTAL RIGHT TO LIFE.

Petitioner incorrectly utilizes a due process of law analysis to establish that the State has no justification for imposing the death penalty. Justice Reardon clarifies the role played by the due process clause of the Fourteenth Amendment in a constitutional attack on the State's right to impose the death penalty in the dissenting opinion of Commonwealth v. O'Neal, 327 N.E.2d 662, 700 (Mass. 1975):

> "The Eighth Amendment is the appropriate avenue for consideration of this question but standing by itself is not applicable to the States. Rather it is because the due process clause has been held to incorporate the proscriptions against cruel and unusual punishments contained in the Eighth Amendment that we refer to the latter amendment as binding on the States. ...Putting to one side the question of arbitrary inflictions of punishments, all indications are that the only substantive limitation on punishments contained in the Federal Constitution is the Eighth Amend-mend proscription against cruel and unusual punishment."

It has been argued that the death penalty is unnecessarily cruel, however, this is to deny retribution, deterrence and incapacitation as justifiable social purposes in the punishment of murderers. Evidence that the death penalty has a greater deterrent effect than life imprison-ment has been inconclusive, however, this Court held in

Gregg v. Georgia, 428 U.S. 153, 175 (1975), that:

> "We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved."

It is at least true that the death penalty is not grossly disproportionate to the crime of murder committed in the course of a robbery. Nor is there any purpose to inflict unnecessary pain. As was noted by four judges in Trop v. Dulles, 356 U.S. 86, 99 (1957):

> "The death penalty has been employed throughout history, and in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Petitioner's compelling state interest argument improperly raises a question under the Equal Protection Clause of the Fourteenth Amendment in depriving the Petitioner of "life, liberty or property". The Equal Protection Clause "applies only where there is an arbitrary discrimination between classes similarly situated". Roush v. White, 389 F. Supp. 396, 402 (N.D. Ohio 1975). The Petitioner has failed to establish a suspect classification.

The State submits that Ohio Revised Code Section 2929.04 (1974) does not create an arbitrary classification. It applies to all who are found guilty by a jury of aggravated murder, the principal charge, and of one or more of the specifications of aggravating circumstances, absent one of

the three explicitly stated mitigating circumstances.

Respondent submits that the proper test to be applied is the "rational basis" test set out in McDonald v. Board of Elections, 394 U.S. 802, 809 (1969) which states that the statutory classification is valid if it is rationally related to a legitimate state interest. The Classification is afforded a presumption of constitutionality and will not be set aside if any set of facts reasonably can be conceived to justify it. The State submits that the death penalty is rationally related to legitimate state interests: deterrence of the crime of murder, retribution and incapacitation.

PART E

THIS COURT GRANT CERTIORARI TO CONSIDER WHETHER THE MITIGATION FACTORS LISTED IN OHIO CAPITAL PUNISHMENT STATUTE ARE UNCONSTITUTIONALLY LIMITED.

The only capital offense in Ohio under its new criminal code is Aggravated Murder. The death penalty is precluded unless a person is convicted of Aggravated Murder, and an additional aggravating specification, by the trier of the facts. Ohio Revised Code, Sections 2903.01, 2929.03, and 2929.04(A).

The death penalty is only considered at the sentencing stage if a person is convicted of both the principal charge and the specification. If a person is convicted in such a manner, a separate hearing is conducted to consider mitigating factors, as set out in Ohio Revised Code, Section 2929.04(B).

> (B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:
> (1) The victim of the offense induced or facilitated it.
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

The Supreme Court of Ohio automatically reviews all cases in which the death penalty has been imposed. Ohio Constitution, Article IV, Section 2.

Petitioner contends that Ohio's capital punishment statute has the same deficiencies as were found to exist in North Carolina and Louisiana. Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976), Cf. Roberts v. Louisiana, 45 L.W. 4584 June 7, 1977. Those state capital punishment statutes were struck down because they had mandatory death sentences for certain classes of offenders, regardless of the circumstances of the offender.

However, an analysis of Ohio's capital punishment statute shows that it is similar to that of Florida. Fla. Stat. Ann., section 491.141. Proffitt v. Florida, supra. The sentencing procedure is at a bifurcated hearing, which only occurs after the trier of facts has found that the offender has committed aggravated murder with a particular specification, beyond a reasonable doubt. At the mitigation hearing any relevant evidence may be produced. The Ohio Supreme Court has held that:

> Syllabus 2. Relevant factors such as the age of the defendant and prior criminal record are among those to be

considered by the trial judge or three-judge panel in determining whether the existence of a mitigating circumstance pursuant to R.C. 2929.04(B)(2) and (3) was established by a preponderance of the evidence. State v. Bell (1976), 48 Ohio St.2d 270.

While youth of the offender, and his lack of a prior criminal record are not specifically enumerated as separate mitigating factors they are considered by the Ohio Courts. Jurek v. Texas, 428 U.S. 262 (1976), upheld Texas' capital punishment statute even though none of the particularized mitigating factors were enumerated. The constitutionality of the Texas procedures was sustained because they allowed consideration of mitigating factors. Jurek v. Texas, 262, 271-272.

Additionally the Ohio Supreme Court has stated:

1. For the purpose of the mitigation inquiry, the words "psychosis or mental deficiency," as contained in R.C. 2929.04(B)(3), authorize the trial judge or panel to use the broadest possible latitude in determining the defendant's mental state or capacity.

2. Under R.C. 2929.04(B)(3), a convicted defendant's mental state or capacity should be considered in light of all the circumstances, including the nature of the crime itself, so that it may be determined whether the condition found to have existed was the primary producing cause of his offense. State v. Black (1976), 48 Ohio St.2d 262.

Since Ohio has three specific mitigating factors enumerated and considers other mitigating factors in the

same manner as Texas, Respondent submits that there are no constitutional infirmities in the mitigation portion of its capital punishment statute.

The Ohio Supreme Court has reviewed approximately twenty death sentences, and reversed only one (State v. Lockett (1976), 49 Ohio St.2d 71 which originated from Summit County). However, of the total number of cases (28) from Summit County in which a defendant was charged with a capital offense, only thirteen reached the mitigation stage, five of those defendants including the Petitioner now face the death penalty. Thus, it can be seen that a court can and does apply the mitigating factors where they are applicable.

Petitioner fails to show how the factors he complains of with respect to mitigation even apply to him. The State submits the nature of the crime, and all the other circumstances surrounding the Petitioner weigh heavily against, not for mitigation.

In summary, Ohio's capital punishment statute is not mandatory, and allows the broadest possible consideration of the defendant's mental state, age, and his circumstances including the nature of the crime in determining the applicability of the death sentence.

PART F

THE OHIO COURTS HAVE FAILED TO PROPERLY REVIEW OHIO'S DEATH PENALTY CASES.

Petitioner contends that Ohio Courts fail to properly review death penalty cases. The Ohio Supreme Court has stated:

> "We have in this case, and will in all capital cases independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." State v. Bayless (1976), 48 Ohio St.2d 73, 86.

Petitioner then analyzes certain aspects of several other Ohio cases involving the death penalty. However, this case, when examined carefully, shows that great care was taken to present any evidence concerning mental deficiency, including the factors enumerated in State v. Black, supra. The Ohio Supreme Court reviewed the extensive record compiled at the mitigation hearing and found that the trial court was correct in finding no mitigating factor.

Petitioner showed that he was not extremely intelligent and did not perform well in school. If that alone were the criteria for avoiding the death penalty, a large percentage of the population of Ohio could murder another person, without fear of the death penalty.

PART G

OHIO CAPITAL SENTENCING PROCEDURES IMPERMISSIBLY PENALIZE EXERCISE OF THE RIGHT TO TRIAL BY JURY.

Petitioner misapplies United States v. Jackson, 390 U.S. 570 (1968). That case held that a federal statute had an impermissibly chilling effect upon the right to trial by jury because it allowed the death penalty in kidnapping cases where trial was by jury, but did not permit the death penalty where trial was by the court.

This is not the case in Ohio. Under the Ohio statute, the death penalty is applicable whether trial is by jury or a three judge panel. The death penalty may be avoided under either choice.

The chilling effect on the right to trial by jury found in United States v. Jackson, supra, is simply not present in this case. Petitioner's conclusion that there is a more lenient sentencing standard for a three judge panel is unsupported. Whether there are three judges or one judge, they are presumed to follow the law.

PART H

THE OHIO STATUTORY SCHEME FOR CAPITAL PUNISHMENT CONTAINS A SUBSTANTIAL RISK THAT CAPITAL PUNISHMENT WILL BE INFLICTED IN AN ARBITRARY AND CAPRICIOUS MANNER.

Petitioner argues that since Ohio does not impose the death penalty in murder cases involving premeditated murder it allows the arbitrary infliction of the death penalty. This is directly contrary to the dictates of Gregg v. Georgia, supra for two reasons. First, excluding certain types of murder by narrowing the classification, is within the spirit of limiting the imposition of capital punishment, and providing guidance to juries as in Gregg. Second, counsel for Petitioner has supplanted its judgment for that of the legislature in determining what categories of murder should be punishable by death. Whether premeditated murder is more heinous than felony murder is clearly a legislative decision.

Petitioner also argues that there is no particularized consideration of the individual because it mandates that aiders and abettors get the death penalty. Simply put such is not the case. While an aider and abettor may be subject to the death penalty, there is no requirement that such a person receive the death penalty. Additionally, Petitioner has totally ignored the mitigating factors found in the Code in the first part of this section, and then concludes that since mitigating circumstances have been

found in other cases the death penalty is imposed arbitrarily.

The State maintains that, to the contrary, the fact that mitigating circumstances were found in an appropriate case denotes that the death penalty is not automatically applied to all persons convicted of aggravated murder with a specification.

PETITIONER'S SECOND REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ACTION OF THE STATE TRIAL COURT IN REQUIRING PETITIONER TO SUBMIT TO A PRE-TRIAL PSYCHIATRIC EVALUATION WITH RESPECT TO A MITIGATING FACTOR WHOSE EXISTENCE COULD PRECLUDE THE IMPOSITION OF THE DEATH PENALTY AND MAKING EACH REPORT AVAILABLE TO BOTH THE JUDGE AND THE PROSECUTOR VIOLATES PETITIONER'S RIGHTS UNDER THE FIRST, FOURTH, SIXTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Petitioner's contention that the trial court committed prejudicial error in ordering a pre-trial psychiatric evaluation of the Petitioner and then permitting the State to review same, is without merit for the following reasons.

First, Joseph Eschack was shot and killed on December 28, 1974. Gary Hendon testified that on December 30, 1974, he found the wallet of the deceased in the basement of 687 Warner Court and that Edwards slept there. On the same day, Hendon testified that he gave the wallet to his supervisor, Daniel Goins. Goins, in turn, testified that on December 30, 1974, he met with officers of the Akron Police Department at which time he gave the wallet to these officers. Thus, the officers assigned to the Eschack investigation were aware of both the wallet and Hendon and Goins as prospective witnesses long before the psychiatric evaluation was ever ordered.

Second, the Petitioner's recorded confessions were taken by officers of the Akron Police Department on the ninth

and tenth days of January, 1975. The psychiatric evaluation was not ordered until January 17, 1975, nor was a copy of same given to the prosecution until sometime in February, 1975. Thus, any details of the Petitioner's participation in the killing of Eschack contained in this report were not revealed to the State until after the investigation into this murder was drawing to a close. Therefore, the State submits that the psychiatric report of the Petitioner in no way provided any information concerning the Petitioner's participation in the killing that had not already been uncovered by the investigating officers.

Third, since this psychiatric report was never introduced into evidence nor referred to in the presence of the jury, any discussion of same concerning the guilt or innocence of the Petitioner is clearly academic. This Court has stated that where the record is insufficient to show that the trial judge infected the jury by his handling of a pre-sentence report no prejudicial error attaches to the fact that the report was submitted to the judge. Gregg v. United States, 394 U.S. 489 (1969).

Fourth, the Ohio Supreme Court affirmed the reliance on Section 2945.37 of the Ohio Revised Code, which requires an inquiry into the present sanity of the defendant, whether raised by the defendant or otherwise. (Copy of R.C. 2945.37 attached). The trial judge emphasized that his reason for ordering the report was to determine whether this person

should stand trial (Transcript, Pages 185-186).

Fifth, the report submitted by Doctor Migdal was not a pre-sentence report pursuant to Cr. R. 32.2(B). The references made by Petitioner to that provision, and the federal cases interpreting the similar Federal Rule are not applicable to this case. The report (appended to Petitioner's brief) is a brief recitation of the facts that Petitioner had already given in his taped recorded statement.

Finally, the Petitioner's contention that he was denied the opportunity to have his case tried before a judge instead of a jury is not well taken. The record is devoid of any request to have the case tried to the court. Furthermore, assuming arguendo that such a request was made, the trial court could have simply transferred the case to another court if it felt that the reading of the psychiatric evaluation of the Petitioner would preclude it from functioning as an impartial trier of fact.

Therefore, the State respectfully submits that the error committed by the trial court in ordering the psychiatric evaluation of the Petitioner before trial was clearly harmless.

PETITIONER'S THIRD REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE MERE RECITATION OF MIRANDA WARNINGS WITH A PURPORTED AFFIRMATIVE ANSWER AS TO THEIR MEANING COMPLIES WITH THE REQUIREMENT OF A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF THE RIGHT AGAINST SELF-INCRIMINATION, AND THE RIGHT TO ASSISTANCE OF COUNSEL BY PETITIONER WHO WAS A BORDERLINE RETARDED, HAD ONLY A SECOND-GRADE READING LEVEL AND WAS UNABLE TO READ THE MIRANDA WARNING CARD PRESENTED TO HIM.

The Petitioner was given all of the "Miranda" warnings prior to each interrogation (Transcript, Pages 192-193, 240-242, 358-361, 399-400 and 442-444). After each part of the warning was given, the Petitioner indicated that he understood that particular right. After all the warnings were given, the Petitioner was asked if, understanding his rights, he wished to talk about the homicide. Each time he immediately responded yes. Petitioner did not ask for an attorney. Edwards indicated that he was a high school graduate, and that he understood what was being said to him. Edwards was 21 years old. Under these circumstances the waiver was a knowing waiver. See United States v. Cook, 418 F.2d 321 (9th Cir. 1969).

This is not a case where the defendant asks for an attorney or indicates that he does not want to answer any questions. State v. Jones, 37 Ohio St.2d 21. Miranda v. Arizona, 384 U.S. 436 does not require a police officer to ask the defendant whether he wants an attorney; he need only

inform the accused, as was done here, that the accused has a right to a retained or appointed attorney. There is no evidence that the Petitioner did not understand what was being said to him at the time the warnings were read to him.

The State submits that the proper test in deciding whether the defendant's confession was involuntarily induced is the totality of circumstances test. The Court should consider the totality of the circumstances, including the age, mentality and prior criminal experience of the accused; the length, intensity and frequency of interrogation, the existence of physical deprivation or mistreatment; and the existence of threat or inducement. Brown v. United States, (C.A. 10, 1966), 356 F.2d 230, 232. The Supreme Court of Ohio, State v. Edwards, 49 Ohio St.2d 31, 39 (1976) held that under the "totality of circumstances" test, the Petitioner in this case had voluntarily waived his constitutional rights. The Petitioner, at the time of his first confession, had been in custody for only an hour. The atmosphere was non-coercive and the questioning had not been continuous. There was no physical deprivation or mistreatment. While Petitioner states that he was questioned for a period of eleven (11) hours, he was only in the interrogation room 9½ hours. Further, the interrogation was intermitent, and for short periods of time, not continuous.

There is evidence that the Petitioner was below average in intelligence. However, expert testimony indicated

that he was not mentally deficient or retarded. He was a graduate of one of the local high schools. There is evidence that he was educationally deficient. However, educational deficiency does not equate with mental deficiency. There is general agreement among the courts that a confession of crime is not inadmissible merely because the accused, who was not insane, was of less than normal intelligence. See, 69 A.L.R.2d 350; Bishop v. Rundle, 309 F. Supp. 312 (1970); Lunnermon v. Peyton, 310 F. Supp. 323 (1970). The record indicates that although the Petitioner may be of less than normal intelligence, that he understood what was being said to him.

PETITIONER'S FOURTH REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT DENIED PETITIONER HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS BY ALLOWING PREJUDICIAL HEARSAY STATEMENTS AT PETITIONER'S TRIAL AND THEN PRECLUDING DEFENSE COUNSEL FROM COMMENTING TO THE JURY UPON THE FAILURE OF THE HEARSAY DECLARANT TO TESTIFY AT TRIAL.

Ohio Rule of Criminal Procedure 16(B)(4) provides:

> The fact that a witness' name is on a witness list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at trial.

Respondent maintains that the prohibition is an absolute, without exception. The rule states that there "shall not be" comment on the fact that a witness was not called, although on a prospective witness list.

A party is not required to use every prospective witness it may have. Once the prosecution has established its case, it may rest at the point it chooses. The rule effectively precludes the opponent's raising doubt or innuendo about an uncalled witness, and what he might say.

If the Petitioner considered these people to have an important bearing on his defense, he could have subpoenaed them himself. The record shows that Manning was interviewed by defense counsel in the discovery stages of trial.

Finally, the trial court's ruling prohibited Petitioner from commenting upon the State not calling a person

as a witness. It was not a prohibition from mentioning that person's name or the testimony concerning that person. While this issue was raised below the hearsay issue now raised by Petitioner, has not been raised before. Accordingly, Respondent contends that issue has been waived.

PETITIONER'S FIFTH REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S INSTRUCTIONS THAT IF THE JURY FOUND CERTAIN FACTS TO BE TRUE THEN "A PRESUMPTION TO KILL MUST BE INFERRED" VIOLATED PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

Petitioner did not object to the charge, or request a correction. Criminal Rule 30 prohibits a party from assigning error to any portion of the charge unless he objects thereto before the jury retires. Also see, State v. Lane, (1976), 49 Ohio St.2d 77.

Further, the charge, relating to this issue, when read in its entirety reveals that the trial court properly instructed the jury. The trial court said the following:

> "It must be established in this case that at the time in question there was present in the mind of the defendant a specific intent to kill Joseph Eshack, Jr.
>
> Now, purpose is the decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidently. Purpose and intent mean the same thing.
>
> The purpose with which a person does an act is known only to himself unless he expresses it to another or indicates it by his conduct. The purpose with which a person does an act is determined from the manner in which it is done, the means and method and the weapon used, and all other facts and circumstances in evidence.

> If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill must be inferred from the use of said weapon. Both an inference of intent to kill and an inference of malice may be inferred from the facts and circumstances of an unlawful killing where a deadly weapon is used." (Transcript, Pages 554-555).

The Ohio Supreme Court held that the above instruction did not constitute prejudicial error. State v. Edwards, 49 Ohio St.2d 31, 45 (1976).

Traditionally, Ohio Courts have held that, "in determining purpose, you may look to all the surrounding circumstances, including what was said and done in relation thereto, bearing in mind the presumption of law, that everyone is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such intent". State v. Huffman, 131 O.S. 27, 31 (1936). See also, Jones v. State, 51 Ohio St.331, 38 N.E. 79 (1894); Farrer v. State, 2 Ohio St. 54 (1853). It is not always possible to prove a purpose by direct evidence since purpose and intent are subjective facts within the mind of man. Presumptions as applied to criminal law are therefore, necessarily a part of trial practice.

In more recent cases Ohio courts have held that intent to kill..."may be deduced from the surrounding circumstances, including the instrument used, its tendency

to destroy life if designed for that purpose, and the manner of inflicting a fatal wound." State v. Robinson, 161 O.S. 213, 218-219 (1954). See also, State v. Fugate, 36 Ohio App. 2d 131, 132 (1973); State v. Salter, 149 O.S. 264 (1948).

Accordingly, the instruction taken as a whole was proper with respect to the element of purpose.

The applicable statute in the instant case, Ohio Revised Code section 2903.01(B) (1974) is not equivalent with the statute for first degree murder in the old code which required that deliberate and premeditated malice be proved. All that is required under the new statute is that the death be purposely caused while committing or fleeing after committing one of the specified felonies, including aggravated robbery.

CONCLUSION

The Respondent respectfully requests this Court, pursuant to the argument offered, to deny Petitioner's Writ of Certiorari.

Respectfully submitted,

STEPHAN M. GABALAC
Prosecuting Attorney

Carl M. Layman III

CARL M. LAYMAN III
Assistant Prosecuting Attorney
Appellate Review Division
City-County Safety Building
53 East Center Street
Akron, Ohio 44308

216/379-5510

CERTIFICATION OF SERVICE

I, CARL M. LAYMAN III, being a member of the bar of the United States Supreme Court, do hereby certify, pursuant to Supreme Court Rule 33(3)(b), that one copy of the Respondent's Answer to Petitioner's Writ of Certiorari was mailed, first class postage paid, to: ALBERT S. RAKAS, Attorney at Law, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325 and THEODORE CHAPARKOFF, Attorney at Law, 501 East Exchange Street, Akron, Ohio 44307.

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Appellate Review Division
City-County Safety Building
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Akron, Ohio 44308

216/379-5510

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A P P E N D I X

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A P P E N D I X A

STATUTE

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[PROCEEDINGS ON PLEA OF INSANITY]

§ 2945.37 Inquiry into insanity of defendant. (GC § 13441-1)

If the attorney for a person accused of crime whose cause is pending in the court of common pleas, before or after trial suggests to the court that such person is not then sane, and a certificate of a reputable physician to that effect is presented to the court, or if the grand jury represents to the court that any such person is not then sane or if it otherwise comes to the notice of the court that such person is not then sane, the court shall proceed to examine into the question of the sanity or insanity of said person, or in its discretion may impanel a jury for such purpose. If three fourths of such jury agree upon a verdict, such verdict may be returned as the verdict of the jury. If there is a jury trial and three fourths of the jury do not agree, another jury may be impaneled to try such question.

HISTORY: GC § 13441-1; 113 v 123 (177), ch.20, § 1. Eff 10-1-53. Analogous to former GC §§ 13577, 13608, 13609.

Forms

Entry ordering sanity inquiry, 1 OCP&P 4.07b
Motion for Sanity Inquiry, 1 OCP&P 4.07